DATUK YAP PAK LEONG

v.

SABABUMI (SANDAKAN) SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: 02-275 OF 1995]
7 SEPTEMBER 1996

CONTRACT: *Interpretation of contracts - Implication of terms into a contract - Governing principles - Whether Court empowered to imply terms - Whether part of interpretative functions of Courts - Whether to lean in favour of upholding contract.*

CONTRACT: *Interpretation of contracts - Implication of terms into a contract - Proper approach - Ambiguous and unambiguous contracts - Contracts by laymen and those made by lawyers - Whether calling for a different approach - Proper test - Whether that of the "necessity test" - Whether the "officious bystander test".*

CONTRACT: *Interpretation of contracts - Implied terms - Trial Judge implying terms into contract - Legal basis - Whether trial Judge exceeded role entrusted to him by law - Whether re-writing contract - Whether wrong approach adopted.*

CONTRACT: *Construction of terms - Whether an assignment - Appellant granted licence to carry out gaming activities under Pool Betting Act 1967 - Activities allowed under licence sub-contracted to respondent - Agreement thereof - Whether amounted to an assignment - Assignment prohibited by licence - Whether agreement void.*

CONTRACT: *Formation - Validity - Void contract - Section 24(b) Contracts Act 1950 - Agreement made pursuant to a gaming licence issued under Pool Betting Act 1967 - Agreement violated terms of licence - Whether agreement illegal and void.*

INTERPRETATION: *Intrepretation of statutes - Duty of Court - Whether to interpret provisions as to advance real intention of Parliament.*

INTERPRETATION: *Pool Betting Act 1967 ss. 5 & 21 - Proper effect - Whether prohibiting any assignment of licence granted under the Act.*

The appellant was registered under the Societies Act 1966 for the purpose of carrying on gaming activities in Sandakan. Pursuant to its purpose, the appellant obtained an exemption from the relevant authorities under the Gaming Ordinance (Cap. 50) whereby the appellant was allowed to carry on certain gaming activities in Sabah. The appellant also received a licence to conduct public lotteries.

The appellant entered into an agreement with the respondent by which the company (respondent) was wholly responsible, *inter alia*, to construct a race course with all necessary facilities and to manage, operate and maintain the same. All cost resulting from the above were to be borne by the company. In sequel to this, the company was granted exclusive rights by the appellant to conduct and manage all betting on the races at the race course and lottery operations related to such races for twenty years, upon the expire of which all rights were to revert to the Club (appellant). By the agreement, the company was to pay the Club 2% of the gross sale taking derived from all betting on the races while keeping themselves the balance 98%. The agreement also included a few terms dealing with what is to happen in the event either the above-mentioned exemption or licence is cancelled.

Pursuant to the agreement, the respondent expended large sums of money in keeping with their part of the bargain. Some 2 years later, the relevant authorities cancelled the original licence but an amended licence was issued. This amended licence included a condition to the effect that the "... licence shall be personal to the licensee and shall not be transferable in any manner whatsoever." Shortly after, with the Pool Betting Act 1967 ('the Act') having been extended to Sabah, the Finance Ministry informed the Club of their decision to cancel the amended licence. They further informed the Club that from thereon a licence under the extended law is necessary for gaming activities. Consequently, the Club applied for and was granted a licence under s. 5 of the Act. This licence contained some new conditions, the most relevant of which was condition 23 which prohibited any transfer or assignment of the whole or any part of any of the rights, duties and obligations appearing in the licence.

Subsequent to this, the respondent took out an Originating Summons claiming for certain declaratory and other reliefs. The High Court, upon hearing the matter, and upon recourse to the "officious bystander test", found that there ought to be implied into the agreement a term to the effect that the licence under the Act fell within the scope of the agreement. Thus the Court granted, *inter alia*, the declarations (i) that the licence under the Act and any renewals thereof is within the scope of the agreement entered into between the parties, and (ii) that the Club was in breach of the agreement.

The Club has appealed against the above decision, and before the Court of Appeal the primary issues that arose were:

(i) whether the learned Judge was right in law in implying the term into the agreement and in applying the "officious bystander" test therefor.

(ii) whether the learned Judge, by implying the term, had exceeded the role entrusted to him in that he did not merely interpret the contract but actually re-wrote it.

(iii) whether the agreement was an assignment, and so, was illegal and void after the issuance of the amended licence and the licence under the Act.

(iv) whether, assuming there was a breach of the agreement by the Club, discretionary relief in the form of a declaration ought to have been granted to the respondent.

The facts also showed that the said agreement was prepared by a firm of solicitors of which the trial Judge was formerly a partner. This being the case, notwithstanding that both Counsel had no objection to the Judge hearing the case, a poser was raised by the Court of Appeal as to the propriety of the learned Judge hearing the case.

Held:

[1] It is for the parties who intend to be bound by mutual obligations to make a contract for themselves. It is outside the scope of judicial power to make one for them.

[2] Where businessman make an agreement between themselves, whether aided or unaided by legal advisers, and there are ambiguities in their contract, the Court will, as far as possible, lean in favour of upholding their bargain. There is only a very narrow function which is reserved to the Court in the matter of implying terms in a contract. This role of the Court in upholding agreement is not confined to document drafted by laymen and includes those prepared by lawyers.

[3] Where a contract is couched in unambiguous language, the Court must give effect to it. But where the terms of a contract are ambiguous, the Court may imply a term in order to uphold the transaction.

[4] The exception to the strict rule made when there arises an ambiguity in the meaning that is to be attached to words in a contract, has no application to the present case since the respondent's case was not that

the term contended for should be implied because the agreement was capable of being construed in one of two ways. Neither did the learned Judge proceed upon that basis. It follows that the rule of construction that must be adopted in the present case is that which applies to the interpretation of contracts, the meaning of which is unambiguous.

[5] A Court's power to imply a term in a contract forms part of its interpretative jurisdiction.

[6] An examination of the authorities shows that the law differentiates between two categories of cases - Category I and Category II - when determining whether a term ought to be implied in a contract, subject always to the qualification that there is absent a contrary intention. Such a contrary intention may take the form of an express stipulation in the contract. For it is a well-established principle of law that a term will not be implied if to do so would contradict some express provisions in the contract or set at naught the main aim or object of the contract.

[7] Category I comprises those relationships in which the Court more readily implies a term in the contract unless there is evinced a contrary intention. The Court acts in such cases with greater readiness to imply a term in order to make a particular relationship workable. Contracts between a banker and his customer, between an employer and his employee, between a principal and his agent, between a vendor and purchaser of immovable property and between a landlord and his tenant fall within this category.

[8] The test that is to be applied when implying a term in the relationships within Category I is necessity.

[9] Category II consists of cases not falling within Category I, that is to say, where no special relationship such as those recognised by the law exists. The law is less-ready to imply a term into a contract falling within Category II. A higher standard or test is required to be satisfied before a Court will act.

[10] The fact that an event has occurred for which the parties made no provision in the agreement is not a valid reason in law for the Court to interfere and imply a term into their contract.

[11] It is quite apparent that the instant case is not a Category I case as it does not concern any of the well-established relationships that come within that Category.

[12] The learned Judge adopted a wholly erraneous approach to the case. This is not a case where detailed terms were omitted. On the contrary,

the parties here have spelt out their rights and obligations very clearly and made provision for certain contingencies. The parties were prepared to take their chances in relation to an eventuality for which no provision is made. Yet the Judge acted to provide for an event which the parties were content to leave untouched.

[13] By the terms of the agreement, the Club assigned to the respondent all the rights and benefit conferred by the original licence.

[14] It is plain from a reading of the Act as a whole that Parliament's intention in passing it was to regulate and control gaming activity throughout the country. Courts are the obedient will of Parliament as expressed in the words of the written law enacted by the latter. They must therefore render an interpretation of the provisions of a statute as best advances the intention of Parliament. The Courts have no authority to re-write a statute. The language of the Act must be heeded and a meaning that advances the legislative purpose must be given to it.

[15] In *Commissioner of Income Tax Mysore v. Union Tobacco Co.* AIR 1960 Ker. 276, Ansari J held that "A working test for finding whether the intention (of the Act) be to prohibit is to ascertain whether the punishment is repeated at each act and where that be done the act would be treated as forbidden". This test may be safely applied to s. 21 of the Act here with the result that it is to be read as containing a prohibition and not merely imposing a penalty.

[16] Parliament thus intended not merely to prescribe a penalty, but to prohibit the performance of those activities set out in paras. (a) through (c) of s. 21(1) of the Act. The prohibition is not express but it is plain enough to discern by necessary implication. The Act thus impliedly prohibits the assignment or transfer of the licence in question.

[17] By s. 24(b) of the Contracts Act 1950, an agreement is not lawful if it is of such a nature that, if permitted, it would defeat any law. Further, from the authorities under s. 24 of the Contracts Act 1950, such as *George v. Greater Adelaide Land Development Co. Ltd.* [1929] 43 CLR 91, a statutory prohibition against an agreement need not be express so long as it is implied.

[18] Even upon a view that the Act is silent upon the matter (i.e. on the question of assignment), the agreement is nevertheless illegal and void because it violates the terms of the new licence. Having regard to the scheme and policy of the Act, it does not matter whether the prohibition against assignment is contained in the Act or merely in the licence. The result is the same. Thus, the agreement, if countenanced, would defeat

the Act. The agreement therefore falls squarely within s. 24(b) of the Contracts Act 1950, and is, by reason thereof, illegal and void.

Obiter dictum:

Despite the absence of objections from Counsel, the learned Judge ought not, in the circumstances of this case, have heard the matter. He had much too close a connection with the matter. There may be cause for concern that his decision was reached because of knowledge to which he alone was privy at the time the agreement was being negotiated.

[Appeal allowed. Cost in proceedings below and of the appeal to be paid by respondent]

*[**Bahasa Malaysia** Translation of Headnotes]*

KONTRAK: *Pentafsiran kontrak - Mengandaikan terma-terma ke dalam kontrak - Prinsip-prinsip yang menguasai - Samada Mahkamah diberi kuasa untuk mengandaikan terma-terma - Samada merupakan sebahagian daripada fungsi interpretasi Mahkamah - Samada Mahkamah harus condong kepada mempertahankan kontrak.*

KONTRAK: *Pentafsiran kontrak - Mengandaikan terma-terma ke dalam kontrak - Pendekatan wajar - Kontrak jelas dan tidak jelas - Kontrak yang dibuat oleh orang biasa dan yang dibuat oleh Peguam - Samada menghendaki pendekatan yang berlainan - Ujian yang wajar - Samada merupakan "necessity test" - Samada "officious bystander test."*

KONTRAK: *Pentafsiran kontrak - Terma tersirat - Hakim perbicaraan mengandaikan terma-terma ke dalam kontrak - Dasar undang-undang - Samada Hakim perbicaraan melampaui peranan yang diamanahkan kepadanya oleh undang-undang - Samada menulis semula kontrak - Samada pendekatan yang salah diterima-pakai.*

KONTRAK: *Pentafsiran terma-terma - Samada merupakan satu serahanhak - Perayu diberi lesen untuk menjalankan aktiviti perjudian di bawah Akta Pertaruhan Pool 1967 - Aktiviti yang dibenarkan di bawah lesen di sub-kontrakkan kepada responden - Perjanjian yang berkaitan - Samada merupakan satu serahanhak - Serahanhak dilarang oleh lesen - Samada perjanjian tak sah.*

KONTRAK: *Pembentukan - Keesahan - Kontrak tak sah - Seksyen 24(b) Akta Kontrak 1950 - Perjanjian dibuat selaras dengan lesen perjudian yang dikeluarkan di bawah Akta Pertaruhan Pool 1967 - Perjanjian melanggari terma lesen - Samada perjanjian tak sah di sisi undang-undang dan batal.*

PENTAFSIRAN: *Pentafsiran statut - Kewajipan Mahkamah - Samada untuk mentafsirkan peruntukan-peruntukan bagi mengemukakan niat sebenar Parlimen.*

PENTAFSIRAN: *Akta Pertaruhan Pool 1967 ss. 5 & 21 - Kesan yang wajar - Samada melarang apa-apa serahanhak lesen yang diberikan di bawah Akta.*

Perayu telah didaftarkan di bawah Akta Pertubuhan 1966 bagi tujuan menjalankan aktiviti perjudian di Sandakan. Selaras dengan tujuannya, perayu telah mendapatkan pengecualian daripada pihak-pihak berkuasa yang relevan di bawah Ordinan Perjudian (Cap. 50) di mana perayu telah dibenarkan untuk menjalankan beberapa aktiviti perjudian di Sabah. Perayu telah juga menerima lesen untuk mengendalikan loteri awam.

Perayu telah memasuki satu perjanjian dengan responden dengan yang mana syarikat (responden) adalah bertanggungjawab sepenuhnya, antara lainnya, untuk membina sebuah balapan lumba kuda dengan kesemua kemudahan-kemudahan yang perlu dan akan mengendalikan, menguruskan serta menyenggarakannya. Kesemua kos hasil daripada perkara yang tersebut di atas akan ditanggung oleh syarikat. Ekoran daripada ini, syarikat telah diberikan hak eksklusif oleh perayu untuk mengendalikan dan menguruskan kesemua pertaruhan atas perlumbaan-perlumbaan di balapan lumba kuda itu serta operasi-operasi loteri yang berkaitan dengan perlumbaan-perlumbaan sedemikian selama dua puluh tahun, selepas mana, kesemua hak hendaklah dikembalikan kepada Kelab (perayu). Menurut perjanjian tersebut, syarikat akan membayar kepada Kelab 2% daripada kutipan jualan kasar yang diperolehi daripada pertaruhan atas perlumbaan-perlumbaan tersebut dan menyimpan bagi diri mereka sendiri bakinya sebanyak 98%. Perjanjian itu juga telah memasukkan beberapa terma berhubung dengan apakah yang akan berlaku sekiranya pengecualian atau pun lesen yang tersebut di atas dibatalkan.

Selaras dengan perjanjian di atas, responden telah membelanjakan sejumlah wang yang banyak dalam memenuhi janji mereka. Lebihkurang 2 tahun kemudiannya, pihak-pihak berkuasa yang relevan telah membatalkan lesen asal tetapi satu lesen terpinda telah dikeluarkan. Lesen terpinda ini telah memasukkan satu syarat yang secara berkesannya menyatakan bahawa lesen tersebut adalah khas untuk pemegang lesen sahaja dan tidak boleh dipindahkan dalam apa cara sekalipun. Sejurus selepas itu, dengan berkuatkuasanya Akta Pertaruhan Pool 1967 ('Akta tersebut') ke Sabah, Kementerian Kewangan telah memaklumkan kepada Kelab mengenai keputusan mereka untuk membatalkan lesen terpinda itu. Mereka selanjutnya memaklumkan bahawa daripada tarikh itu satu lesen di bawah Akta tersebut adalah perlu untuk aktiviti-aktiviti perjudian. Akibatnya, Kelab telah memohon bagi mendapatkan, dan telah diberikan satu lesen di

bawah s. 5 Akta tersebut. Lesen ini mengandungi beberapa syarat baru, yang paling relevan adalah syarat 23 yang mana melarang apa-apa pindahmilik atau serahanhak keseluruhan atau mana-mana bahagian daripada mana-mana hak, kewajipan dan tanggungjawab yang terdapat dalam lesen itu.

Berikutannya, responden telah mengeluarkan satu Saman Pemula menuntut beberapa pengisytiharan dan relief-relif lain. Mahkamah Tinggi, setelah mendengar perkara tersebut, dan mengguna-pakai "officious bystander test", mendapati bahawa satu terma harus diandaikan ke dalam perjanjian itu yang memberi kesan bahawa lesen di bawah Akta tersebut adalah halperkara yang termasuk dalam skop perjanjian tersebut. Dengan itu Mahkamah telah memberikan, antara lainnya, pengisytiharan-pengisytiharan (i) bahawa lesen di bawah Akta tersebut dan mana-mana pembaharuannya adalah termasuk dalam skop perjanjian yang telah dimasuki antara pihak-pihak terbabit, dan (ii) bahawa Kelab telah memungkiri perjanjian itu.

Kelab telah merayu terhadap keputusan yang tersebut di atas, dan di hadapan Mahkamah Rayuan isu-isu utama yang berbangkit adalah:

(i) samada Hakim yang bijaksana betul di sisi undang-undang dalam mengandaikan terma yang berkenaan ke dalam perjanjian, dan dalam menggunakan ujian "officious bystander" untuk tindakannya itu.

(ii) samada Hakim yang bijaksana, dengan mengandaikan terma tersebut, telah melampaui peranan yang diamanahkan kepada beliau iaitu beliau bukan sahaja mentafsirkan kontrak itu tetapi telah sebenarnya menulis semula kontrak itu.

(iii) samada perjanjian itu merupakan satu serahanhak, dan jika demikian, samada ianya adalah tak sah dan batal selepas pengeluaran lesen yang terpinda itu dan juga lesen di bawah Akta tersebut.

(iv) samada, dengan menganggapkan telah berlakunya satu kemungkiran terhadap perjanjian itu oleh Kelab, relief budibicara dalam bentuk satu pengisytiharan harus diberikan kepada responden.

Fakta-fakta juga menunjukkan bahawa perjanjian tersebut telah disediakan oleh sebuah firma peguamcara yang mana Hakim perbicaraan dahulunya menjadi seorang rakan kongsi. Memandangkan keadaan sedemikian, walaupun kedua-dua Peguam tiada bantahan terhadap pendengaran kes ini oleh Hakim, persoalan telah dibangkitkan oleh Mahkamah Rayuan berhubung kesesuaian Hakim yang bijaksana mendengar kes di sini.

Diputuskan:

[1] Ianya terpulang kepada pihak-pihak yang berniat untuk diikat oleh kewajipan bersama untuk membuat sesuatu kontrak bagi diri mereka sendiri. Ianya adalah di luar bidangkuasa kehakiman untuk membuat suatu perjanjian bagi mereka.

[2] Di mana ahli-ahli peniaga membuat sesuatu perjanjian di kalangan mereka, samada dibantu atau tidak dibantu oleh penasihat undang-undang, dan terdapat kesamaran di dalam kontrak mereka, Mahkamah akan, setakat yang boleh, condong kepada mempertahankan kehendak mereka. Mahkamah hanya diberi hak yang amat kecil untuk membayangkan atau mengandaikan terma-terma ke dalam sesuatu kontrak. Peranan Mahkamah dalam mempertahankan perjanjian tidak terhad kepada dokumen yang disediakan oleh orang biasa tetapi termasuk perjanjian atau kontrak yang disediakan oleh Peguam.

[3] Di mana sesuatu kontrak telah ditulis dalam bahasa yang jelas, Mahkamah mestilah menguatkuasakannya. Tetapi di mana terma-terma sesuatu kontrak itu tidak jelas, Mahkamah boleh mengandaikan terma-terma agar dapat mempertahankan transaksi itu.

[4] Pengecualian kepada kaedah tegas yang dipakai apabila berbangkit kesamaran dalam maksud yang harus diberikan pada sesuatu perkataan dalam kontrak, tidak terpakai dalam kes ini, oleh kerana kes responden bukanlah bahawa terma yang katakan menjadi tersirat kerana perjanjian tersebut boleh ditafsirkan dalam satu atau dua cara. Hakim yang bijaksana juga tidak meneruskan hujahnya berdasarkan asas itu. Ianya mengikut, bahawa kaedah pentafsiran yang mesti diterima-pakai dalam kes semasa ini ialah kaedah yang terpakai kepada pentafsiran kontrak-kontrak yang mempunyai maksud yang jelas.

[5] Kuasa Mahkamah untuk mengandaikan sesuatu terma dalam sesuatu kontrak adalah merupakan sebahagian daripada bidangkuasa tafsirannya.

[6] Suatu pemeriksaan autoriti-autoriti menunjukkan bahawa, tertakluk kepada ketiadaan niat sebaliknya, undang-undang membezakan antara dua kategori kes – Kategori I dan Kategori II – ketika menentukan samada sesuatu terma seharusnya tersirat dalam sesuatu kontrak. Niat bertentangan yang dikatakan di sini boleh tergambar melalui perkataan-perkataan nyata dalam sesuatu kontrak itu. Memang ianya merupakan prinsip undang-undang yang telah lama terpakai, bahawa sesuatu terma tidak akan menjadi tersirat jika melakukan sedemikian akan bercanggah dengan peruntukan nyata dalam kontrak itu, atau menjadikan matlamat utama atau tujuan kontrak itu sia-sia.

[7] Kategori I menyentuh ikatan-ikatan perhubungan di mana Mahkamah akan lebih bersedia untuk mengandaikan sesuatu terma ke dalam kontrak kecuali terdapat niat yang bercanggahan. Dalam kes-kes sedemikian Mahkamah bertindak dengan lebih bersedia untuk mengandaikan sesuatu terma supaya perhubungan itu dapat dikuatkuasakan. Kontrak antara juru bank dan pelanggannya, antara seorang majikan dengan pekerjanya, antara pihak utama dengan ejennya, antara penjual dengan pembeli harta-harta tak alih dan antara tuanpunya tanah dan penyewanya terlingkung di bawah kategori ini.

[8] Ujian yang di pakai mengandaikan sesuatu terma dalam ikatan perhubungan di dalam Kategori I ialah "keperluan" atau "necessity".

[9] Kategori II terdiri daripada kes-kes yang tidak terlingkung dalam Kategori I, iaitu, di mana tiada perhubungan khas seperti yang diiktirafkan oleh undang-undang wujud. Undang-undang kurang bersedia untuk mengandaikan sesuatu terma ke dalam sesuatu kontrak yang terlingkung dalam Kategori II. Satu ujian atau standard yang lebih tinggi perlu dipehuhi sebelum Mahkamah bertindak.

[10] Hakikat bahawa suatu peristiwa telah berlaku di mana pihak-pihak terbabit tidak membuat peruntukan mengenainya dalam perjanjian bukanlah merupakan alasan yang sah di sisi undang-undang bagi Mahkamah mencampuri dan mengandaikan sesuatu terma ke dalam kontrak mereka.

[11] Ianya jelas bahawa kes semasa ini bukan merupakan kes Kategori I kerana ianya tidak melibatkan mana-mana perhubungan yang terlingkung di dalam kategori itu.

[12] Hakim yang bijaksana telah menerima-pakai pendekatan yang salah terhadap kes dihadapannya. Ini bukannya merupakan kes di mana terma-terma terperinci telah ditinggalkan. Sebaliknya, pihak-pihak terbabit telah menyatakan hak dan kewajipan mereka dengan jelas dan membuat peruntukan bagi kontingensi-kontingensi tertentu. Pihak-pihak terbabit memang telah bersedia untuk mengambil risiko berhubung dengan kemungkinan-kemungkinan di mana tiada peruntukan dibuat mengenainya. Tetapi Hakim telah bertindak untuk mengadakan suatu peristiwa yang mana pihak-pihak kepada perjanjian berpuashati untuk membiarkannya begitu sahaja.

[13] Menurut terma-terma perjanjian tersebut, pihak Kelab telah menyerahhak kepada responden kesemua hak dan faedah yang diberikan oleh lesen asal itu.

[14] Membaca Akta tersebut secara keseluruhannya, ianya jelas bahawa niat Parlimen dalam meluluskannya ialah untuk menyelaras dan mengawal aktiviti perjudian diseluruh negara. Mahkamah adalah pengisytihar kemahuan Parlimen sepertimana yang dinyatakan dalam perkataan undang-undang bertulis yang digubal oleh pihak yang kemudian itu. Mereka dengan itu mestilah mengemukakan suatu pentafsiran peruntukan-peruntukan sesuatu statut itu sebaik yang mungkin untuk mengutarakan niat Parlimen. Mahkamah tidak berkuasa untuk menulis semula sesuatu statut. Bahasa sesuatu Akta itu mestilah dipatuhi dan maksud yang menonjolkan tujuan perundangan itu hendaklah diberi.

[15] Dalam *Commissioner of Income Tax Mysore v. Union Tobacco Co.* AIR 1960 Ker. 276, Ansari J memutuskan bahawa "A working test for finding whether the intention (of the Act) be to prohibit is to ascertain whether the punishment is repeated at each act and where that be done the act would be treated as forbidden." Ujian ini boleh dipakai kepada s. 21 Akta di sini yang berakibat bahawa ianya hendaklah dibaca sebagai mengandungi suatu larangan dan bukan hanya mengenakan satu penalti.

[16] Parlimen dengan itu berniat bukan sahaja untuk menetapkan satu penalti, tetapi untuk melarang perlaksanaan aktiviti-aktiviti yang dibentangkan dalam perenggan (a) hingga (c) s. 21 (1) Akta tersebut. Larangan ini itu tidak dinyatakan tetapi terlihat dengan jelas melalui implikasi. Akta tersebut dengan itu secara tersirat melarang serahanhak atau pindahmilik lesen yang dipersoalkan itu.

[17] Menurut s. 24(b) Akta Kontrak 1950, sesuatu perjanjian adalah tidak sah jika ianya bersifat sedemikian rupa, dimana jika ianya dibenarkan, ianya akan menggagalkan mana-mana undang-undang. Seterusnya, daripada autoriti-autoriti di bawah s. 24 Akta Kontrak, 1950, seperti *George v. Greater Adelaide Land Development Co. Ltd.* [1929] 43 CLR 91, larangan berkanun terhadap sesuatu perjanjian tidak perlu dibuat secara nyata asalkan ianya tersirat.

[18] Walaupun atas pendapat bahawa Akta tersebut tidak menyebut perkara ini (iaitu tentang serahanhak), perjanjian berkenaan adalah namun begitu tak sah dan batal di sisi undang-undang kerana ianya melanggari terma-terma lesen baru itu. Memandangkan sekim dan dasar Akta tersebut, ianya tidak menjadi hal samada larangan terhadap serahanhak terkandung di dalam Akta tersebut atau hanya di dalam lesen itu sahaja. Hasilnya adalah sama. Dengan itu, perjanjian tersebut jika ianya disokong, akan menggagalkan Akta tersebut. Perjanjian itu dengan itu terlingkung di dalam maksud s. 24(b) Akta Kontrak 1950, dan adalah, disebabkan oleh perkara itu, menjadi tak sah dan batal.

Obiter Dictum:

Sungguhpun tiada bantahan daripada Peguam, Hakim yang bijaksana tidak seharusnya, dalam keadaan yang wujud di sini, mendengar halperkara yang dipertikaikan. Beliau mempunyai hubungan yang sangat rapat dengan halperkara tersebut. Mungkin terdapat sebab untuk merasa bimbang bahawa keputusannya telah dicapai kerana suatu pengetahuan yang mana hanya beliau sahaja yang mengetahuinya pada waktu perjanjian tersebut dirundingkan.

[Rayuan dibenarkan. Kos dalam prosiding di bawah dan berhubung dengan rayuan hendaklah dibayar oleh responden]

Cases referred to:

Smith v. The Mayor, Aldermen & Burgesses of the Borough of Harwich [1857] 140 ER 572 ***(foll)***

Hillas & Co. v. Arcos Ltd. [1932] All ER (Rep.) 494 ***(foll)***

Australian Broadcasting Commission v. Australasian Performing Right Association Ltd. [1973] 129 CLR 99 ***(foll)***

Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd. [1968] 118 CLR 429

Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor. [1995] 2 CLJ 713; [1995] 1 MLJ 719 ***(refd)***

Codelfa Construction Pty. Ltd. v. State Rail Authority NSW [1981] 149 CLP 337 ***(foll)***

Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1986] AC 80 ***(refd)***

Scally v. Southern Health Board [1992] 1 AC 294 ***(refd)***

Pasuma Pharmacal Corpn. v. Mc Alister & Co. Ltd. [1965] 1 MLJ 221 ***(refd)***

Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai [1986] 3 SCC 309 ***(refd)***

Liverpool City Council v. Irwin [1972] AC 239 ***(refd)***

Davis Contractors Ltd. v. Fareham UDC [1956] AC 696 ***(foll)***

Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd. [1993] 2 MLJ 250 ***(refd)***

Tan Bing Hock v. Abu Samah [1962] 2 MLJ 148 ***(foll)***

Tan Lai v. Mohamed bin Mahmud & Ors. [1982] 1 MLJ 338 ***(cit)***

Paruvathi v. Krishnan [1983] 2 MLJ 121 ***(refd)***

Coramas Sdn. Bhd. v. Rakyat First Merchant Bankers Bhd. [1994] 2 CLJ 143; [1994] l MLJ 369 ***(foll)***

Phoenix General Insurance Co. of Greece S.A. v. Halvanon Insurance Co. Ltd. [1988] QB 216 ***(refd)***

Co-operative Central Bank Ltd. (In receivership) v. Feyen Development Sdn. Bhd. [1995] 4 CLJ 300; [1995] 3 MLJ 313 ***(refd)***

Janki Bai v. Ratan Melu A.I.R [1962] MP 117 (FB) ***(foll)***

Commissioner of Income Tax Mysore v. Union Tobacco Co. AIR [1960] Ker, 276 ***(refd)***

Minister of Resource Planning & Ors. v. Keruntum Sdn. Bhd. [1988] 2 MLJ 226 ***(refd)***

Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd. [1980] 1 MLJ 21 ***(refd)***

Legislation referred to:
Pool Betting Act 1967 ss. 5, 21
Contracts Act 1950 (Rev 1974), ss. 24(b)
Gaming Ordinance (Cap 50)
Modification of Laws (Common Gaming Houses, Lotteries, Betting, Betting and Sweepstake Duties and Racing (Totalisator Board)) (Extension to the States of Sabah and Sarawak) Order,1991, para. 12
National Land Code 1965, s. 68

Other Sources Referred To:
Chitty on Contracts, 25th Edn., para. 842
Pollock Principles of Contract, 10th Edn., p. 233

For the appellant - Cecil Abraham (Colin Lau with him); M/s Colin Lau & Co
For the respondent - K. Anantham (Rodril Fernandez and Wong Chee Lin with him); M/s Shelly Yap Leong Tsue Chong Chia & Co

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal by the Sandakan Turf Club ('the Club') against the decision of the High Court at Kota Kinabalu granting Sababumi (Sandakan) Sdn. Bhd. (the respondent) the following declaratory and other relief:

1. that the Licence dated January 1995 bearing the reference KK/BP(J)/8.00/4/3/3-1 JD.1 (4) issued by the Federal Minister of Finance of the Government of Malaysia to the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) under the Pool Betting Act, 1967 and any renewals thereof is within the scope of the Agreement between the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) and Sababumi (Sandakan) Sdn. Bhd. dated 26 November 1987;

2. that the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) was and still is in breach of the provisions of the said Agreement which confer exclusive right to Sababumi (Sandakan) Sdn. Bhd. to conduct and manage all 3-Digit (3-D) and 4-Digit (4-D) operations in and throughout the State of Sabah;

3. that the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) do pay Sababumi (Sandakan) Sdn Bhd damages to be assessed by the High Court, Kota Kinabalu in respect of the said breach; and

4. that the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) do pay Sababumi (Sandakan) Sdn Bhd costs of this action to be taxed.

We heard this appeal on 21 and 22 May 1996. At the conclusion of the submissions of Counsel, we allowed the appeal and made the necessary consequential orders. The reasons for our decision now follow.

a

Facts and background

The facts relevant to this appeal are as follows.

The Club is a society registered under the Societies Act, 1966. It obtained its certificate of registration on 25 November 1983. As its name suggests, it was b formed for the purpose of carrying on gaming activity in Sandakan. At the time the Club obtained registration, gaming in the State of Sabah was regulated by a State law then in force. It was the Gaming Ordinance (Cap. 50). For convenience, we will, throughout this judgment, refer to it as "the Ordinance". There were provisions in the Ordinance requiring the licensing of gaming c activity in the State of Sabah. The Ordinance also contained provisions that proscribed altogether the carrying on of certain types of gaming activity within Sabah. However, the Ordinance empowered the relevant authority to exempt any person from these provisions.

On 14 February 1984, the Club received such an exemption. This meant that d the Club could organise such gaming activities as pari-mutuel and totalisator betting both of which would be carried out on the premises of a turf club. It is called "on-course" betting.

On the same date, the Club also received a licence from the relevant authority e to organise and conduct other forms of public lotteries, including 3-Digit and 4Digit draws. This is known in the trade as "off-course" betting.

On 26 November 1987, the Club entered into a written agreement ('the agreement') with the respondent. It is a very important document. It lies at the very heart of this case. Indeed, this case is all about the meaning of certain f words appearing in it. The Judge interpreted them in a particular way. It was as a result of his interpretation that he made the orders that the club has appealed against. It is best that we reproduce the whole document, rather than paraphrase it.

g This is what it says:

> "THIS AGREEMENT is made this 26 November 1987 BETWEEN KELAB LUMBA KUDA SANDAKAN (SANDAKAN TURF CLUB) P.O. Box 519, 90007 Sandakan in the State of Sabah, Malaysia, a society duly registered under the Societies Act (hereinafter called 'the Club' which expression shall include its successors and assigns) of the one part, AND SABABUMI (SANDAKAN) SDN. BHD. of h Lot 8 1st Floor, Towering Industrial Centre, 7 Km, Jalan Penampang, P.O. Box 13803, 88844 Kota Kinabalu, in the State of Sabah, Malaysia, a limited company incorporated under the Companies Act (hereinafter called 'the Company' which expression shall include its successors and assigns) of the other part.
>
> i WHEREAS the Club intends to acquire a piece of land in the District of Sandakan for the setting up of a race course with racing and betting facilities.

AND WHEREAS the Club has been granted exemption from the provision of the Gaming Ordinance Cap 50 by the relevant authority in respect of any totalisator or parimutuel to be promoted or operated by it on the proposed Race Course (hereinafter referred to as 'the said Exemption').

AND WHEREAS the Club has also been granted the necessary licence to promote and organize public lotteries (including sweepstakes 3-D and 4-D) in any part of Sabah under the Gaming Ordinance Cap. 50 Sabah (hereinafter referred to as 'the said Licence').

AND WHEREAS the Parties hereto have agreed to cooperate in the construction of the race course and the management of racing facilities in Sandakan and the setting up of the betting facilities in accordance with the terms and conditions hereinafter provided.

NOW THIS AGREEMENT WITNESSETH as follows:

1. In consideration of the terms and conditions hereinafter contained the Parties hereto hereby agree to co-operate with each other in the construction of a race course and the management of racing facilities in Sandakan and the setting up of betting facilities.

2. The company hereby undertakes with the Club as follows:

   (a) To acquire for the club 100 acres of land from the Sandakan Municipal Council or State Government situate at a prime and freely accessible location in Sandakan (hereinafter referred to as 'the said Land') and to arrange for its proper survey and to pay all survey fees and incidental costs, land costs or premium, and costs of issue and registration of the title deed for the said Land in the name of the club or its trustees.

   (b) To construct on the said Land a race course of a standard approved by the relevant authorities, and complete with grand-stand, stables and other facilities and amenities which are necessary for the conduct of pony and thoroughbred horse racing, and in accordance with such plans and specifications which may be approved by the local authority or the Ministry concerned, and to pay all costs and expenses related thereto.

   (c) To set up the betting machines at the race course and also betting facilities off course, as may be permitted under the licence granted to the Club, and to pay all costs and expenses related thereto.

   (d) To manage and maintain in good conditions the race course and all buildings, structures and fixtures thereon and all betting machines and facilities related thereto.

   (e) To operate and manage all pony and thoroughbred horse racing on the race course in accordance with the rules of racing of the club or as may be adopted or approved by the Club from time to time.

(f) To pay to the Club as its share of the revenue in the joint venture herein 2% of the gross sale takings derived from all bettings on the races, 3-D and 4-D operations and other bettings undertaken by the company or its authorised agents, on the races.

3. The Club hereby undertakes with the company as follows

(a) To grant to the company the exclusive rights to run all pony and thoroughbred horse racings on the said race course.

(b) To grant to the company the exclusive rights to conduct and manage all bettings on the races at the race course and to conduct and manage all 3-D and 4-D operations related to such races throughout the State of Sabah.

(c) To sublease the said land to the company for a term of twenty (20) years commencing from the date of completion of the race course thereon, at the nominal annual rent of Malaysian Ringgit One only (RM1/-) for the purposes set out in paragraphs (a) and (b) aforesaid.

(d) The club shall undertake public relations, study tours, promote the breeding of ponies and horses, grow and produce suitable animal feeds, create racing interests and do all things to support the pony and horse racing industry, and provide sporting activities, playing fields and arenas for the members of the Club and the general public and give donations to patriotic, charitable educational and benevolent purposes, and to employ and pay personnels engaged in these activities.

4. Upon the expiration of the twenty (20) years sublease under clause 3(c) aforesaid the company shall deliver up vacant possession of the said Land, the race course and all buildings, structures and fixtures thereon, together with all on-course and off-course betting machines, and all other amenities and facilities forming part of the race course and racing and betting operations, in reasonably good repairs and conditions, natural wear and tear being excepted. The company and its agents and employees shall also cease all 3-D, 4-D and other betting operations connected with the race course. The company shall have no claim whatsoever against the club for capital outlays expended by the company on the race course and the betting facilities.

5. The company in carrying out its undertakings under Clause 2(a), 2(b) and 2(c) shall maintain constant consultations with the club in order to ensure that all constructions and installations are acceptable to all parties concerned.

6. The Club shall co-operate closely with the company in the acquisition of the said land, and sign all documents and forms which may be necessary, provided that all expenses and fees related thereto shall be bome by the company.

7. Subject to the provisions of Clause 8 herein the 2% gross sale takings payable by the company to the Club under Clause 2(f) aforesaid shall be paid weekly and the payment date shall be the first business day one week after the close of the previous week's account, with a grace period of not more than seven (7) days. If the company defaults again after the grace period then the payment date shall be extended for not more than one (1) month subject to the payment of interest on the amount due and payable at the rate of 1% per month with daily rests. If the company defaults again after the one (1) month extension then the Club shall be entitled to give a three (3) months notice in writing to the company and determine this Agreement and upon such termination the company shall comply with all the terms as provided in Clause 4 aforesaid as if the twenty (20) years sublease has duly expired, without any claim whatsoever against the club for loss and damages suffered or for capital outlays expended by the company on the race course and the betting facilities.

8. The company may defer payment of the aforesaid 2% gross sale takings during the first three months of operation and commence actual payment after the third month, provided that the said 2% gross sale taking for the first year shall be fully paid before the end of the year. All payments thereafter shall be in accordance with Clause 7 aforesaid.

9. In carrying out all 3-D, 4-D and other betting operations whether on-course or off-course, the company, its agents and employees shall at all times comply with the laws for the time being in force in Sabah, and the terms and conditions set out in the licence granted to the club and with all orders and directions which may be issued by the licensing authority or the Police from time to time. In the event of any default or offence being committed, the company shall pay and settle all fines and penalties which may be imposed and indemnify and keep indemnified the club its officials and members against the same.

10. The company shall keep proper and up to date accounts of all betting operations and shall make them available for inspection by the Club or its officials or agents at all times. The company shall appoint as its auditors the firm of Yap Lean & Co., Certified Accountants of Kota Kinabalu.

11(i) If the said Exemption granted to the Club under the Gaming Ordinance is cancelled by the Authority concerned due to no fault of either the club or the company, then this Agreement shall be determined forthwith. If this event happens after the company has been in operation of the race course and betting facilities for less than ten (10) years or more, then the said land together with the race course and all buildings structures and fixture thereon, together with all on-course and off-course betting machines, and all other amenities and facilities forming part of the race course and racing and betting facilities shall revert back to the Club as its sole properties and the company shall have no claim whatsover against the club for capital

outlays expended by the company on race course and the betting facilities. If this event happens after the company has been in operation of the race course and betting facilities for less than ten (10) years then the parties shall nagotiate for the take over of the said land and the race course and all betting facilities with the view of fair compensation to the company for the loss of capital outlay. If negotiation should break down then this matter shall be submitted to arbitration in accordance with the laws for the time being in force in Sabah.

(ii) However, if the said Licence issued to the club under the Gaming Ordinance is cancelled by the parties concerned due to no fault of either the club or the company, in such event the company shall still be entitled to operate and manage the ponies and thoroughbred horses racing on the race course as permitted under the said Exemption and in accordance with the terms and conditions of this Agreement which are applicable thereto.

12. (i) If the said Exemption is cancelled because of the fault of the club, then this Agreement shall be determined forthwith and upon such determination the club shall compensate the company for the loss of capital outlays expended in the race course and betting facilities.

(ii) If only the said licence is cancelled because of the fault of the club, then this Agreement shall still subsist and be valid and binding upon the parties in so far as the same relates to the operation and management of the ponies and throughbred horses racing on the race course provided however that in such event the Club shall compensate the company for the loss of capital outlays expended on the race course and betting facilities.

13. (i) If the said exemption is cancelled because of the fault of the company, then this Agreement shall be determined forthwith and upon such determination the said land together with the race course and all buildings, structures and fixtures thereon, together with all on-course and off-course betting machines and all other amenities and facilities forming part of the race course and racing and betting facilities shall revert back to the club as its sole properties.

(ii) If only the said licence is cancelled because of the fault of the company, then this Agreement shall still subsist and be valid and binding upon the parties in so far as the same relates to the operation and management of the ponies and thoroughbred horses racing on the race course provided however that in such event the company shall compensate the club an amount equivalent to the prevailing market value of the buildings, structures and fixtures on the race course, together with all on-course and off-course betting machines and all other amenities and facilities forming part of the race course and racing and betting facilities. Such valuation shall be based upon a valuation carried out by a chartered valuer to be agreed by the parties hereto.

14. Officials of the club shall attend and supervise at all race meetings conducted or managed by the company and such club officials shall be paid such allowance by the company as may be agreed upon from time to time.

15. The company shall be solely liable for all claims for losses and damages which may be made by members of the public arising out of the race meetings conducted or managed by the company, and to indemnify and keep indemnified the club its officials and members against the same. The company shall take out such public liability insurance as may be suitable.

16. A representative of the club shall be appointed a director to sit at the board of directors of the company, with no voting power.

17. All the 3-D, 4-D and the other betting operations agents whether on-course or off-course, shall be appointed by the company on behalf of the club, the licence holder. The appointment letter for each agent shall be signed by the company which shall be entitled to hold such deposit which may be made by the agents, and to be solely liable for all losses arising out of such 3-D, 4-D or other betting operations, and to indemnify and keep indemnified the club its officials and members against the same.

18. The company shall at all times pay all government duty and gaming tax which may be imposed or assessed by the authorities concerned on the racing and betting operations, and indemnify and keep indemnified the club, its officials and members against the same.

19. The company shall not involve the club in any financial liability whatsoever while in the development of the race course or in the subsequent management of the race course and racing and betting operations. Any loan obtained for the development shall be the sole liability of the company.

20. This Agreement shall commence on the date of its execution and the company shall enter into such agreement which may be necessary to secure the said land for the club within seven (7) years thereafter, and shall complete the construction of the race course and other racing and betting facilities within two (2) years after the approval of all development plans by the local authority or ministry concerned.

21. In the event of any dispute arising out of the construction or operation of this Agreement the parties hereto shall endeavour to negotiate a settlement initially and if a settlement cannot be reached the dispute shall be submitted to arbitration in accordance with the laws for the time being in force in Sabah.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

Pursuant to the agreement, there was established a fully equipped race course with all the amenities. The respondent paid for this. The respondent also appointed agents throughout Sabah to accept bets from members of the public. There is no doubt that the respondent expended large sums of money in building and equipping the race course. The Judge has made it amply clear in his judgment that he was much impressed by this fact. Whether his approach was correct is a matter we will comment upon later. For the moment, it is sufficient to say that the respondent when it put out a substantial capital outlay was merely fulfilling its contractual obligations. The respondent had entered into a purely business arrangement - an arms length transaction - with its eyes wide open. It was seeking to reap, and did in fact reap, huge profits from the venture. As is common in all business ventures, there were risks involved and the respondent was obviously prepared to take them.

On 21 September 1989, the Pool Betting Act 1967, ('the Act') a Federal Statute which until that date, regulated pool betting in Peninsula Malaysia, was extended to the State of Sabah. The purpose of this extension was to exercise meaningful and uniform control over all gaming activities throughout Malaysia by placing that control in the hands of the Federal Minister of Finance. As will appear later, the implementation of the Act in Sabah was to have consequences for the Club and the respondent.

On 4 April 1992, the relevant authority in Sabah, in the exercise of its power under the Ordinance, cancelled the original licence dated 4 February 1984 and issued an amended licence to the club. For convenience, we will refer to it as "The Amended licence". The Amended licence contains a condition which was absent in the original licence. It is condition 9 which reads:

> this licence shall be personal to the Licensee and shall not be transferable in any manner whatsoever.

A day later, that is to say, on 15 April 1992, the Ordinance was repealed by para. 12 of the Modification of Laws (Common Gaming Houses, Lotteries, Betting, Betting and Sweepstake Duties and Racing (Totalisator Board)) (Extension to the States of Sabah and Sarawak) Order, 1991. Paragraph 12 has a proviso which reads as follows:

> Provided that any exemption, permit or licence issued or granted under the Gaming Ordinance Sabah or the Gambling Ordinance Sarawak on or before the commencement of this order, shall continue to remain in full force and effect under the respective Ordinances under which it was made, and shall continue in force until it expires, or is varied, amended or revoked under the said laws. For these purposes only, the respective Ordinances shall continue to be in full force and effect.

Accordingly, the repeal did not affect the validity of the Amended licence.

In January 1994 there was an exchange of correspondence between the Club's solicitors and the respondent. The Club, which must have realised the effect which condition 9 of the Amended licence had upon the agreement of 26 November 1987, called for a review of the terms of that agreement. The respondent, however, maintained that the agreement was unaffected by the presence of condition 9. The difference between the parties as disclosed in the correspondence was taken no further at that stage.

On 12 December 1994, the Federal Ministry of Finance wrote to the Club. It is a letter of critical importance. The learned Judge accurately summed up its contents as follows:

> [The] letter conveyed the decision of the Finance Minister to cancel the later licence issued to the club on 14 April 1992 and it informed the club that all gambling activities of the club was allowed to continue up to 31 December 1994. The letter went on to inform the Club that the government had extended the application of the various laws to Sabah and Sarawak and that the club must possess a licence under the said extended laws if the club wish to continue the gaming activities. The letter ended by saying that the course of action taken by the government was to ensure uniform control of the gambling activities throughout the country.

Following this letter, a meeting was held between officers of the Federal Ministry of Finance and representatives of the Club. No evidence was however, led to show what had transpired at that meeting.

On 17 December 1994 the Club submitted an application to the Federal Ministry of Finance for a new licence under the Act which was to commence from 1 January 1995. This was to prevent any disruption in the activities of the Club. The Club also sought the Ministry's approval for the scheme and arrangement of its gaming activities which, the Club said, were the same as that employed under the Amended licence.

On 24 December 1994, the Club wrote to the respondent informing the latter of the cancellation of the Amended licence with effect from 31 December 1994. The respondent replied by a letter dated 30 December 1994 stating that it would cease operations of the 4-D lottery with effect from 1 January 1995. By the same letter, the respondent asked to be notified on the issuance of a fresh licence.

This exchange of correspondence was followed by the issue of a licence, by the Federal Ministry of Finance to the Club, under s. 5 of the Act. This licence (which we will refer to as 'the 1995 licence') is dated January 1995. It contained a host of conditions. Some of them are absent in both the original and the Amended licences. For present purposes we need only to make reference to three conditions appearing in the 1995 licence.

First, condition 9. This requires the Club to submit a list of all the agents appointed by it for the prior approval by the Federal Minister of Finance. Those agents appointed without the Minister's approval or whose appointments are not approved by the Minister may not operate betting outlets.

Second, condition 23 which prohibits any transfer or assignment of the whole or any part of any of the rights duties and obligations appearing in the licence.

Third, condition 25 which empowers the Federal Minister of Finance to add, amend or cancel any of the conditions appearing in the 1995 licence.

Upon an examination of the three documents - the original, the Amended and the 1995 licences - it may safely be said that the last of these differs in material respects from its predecessors.

There was, following the grant of the 1995 licence, an exchange of correspondence between the Club and the respondent. Then, on 17 February 1995, the respondent took out an Originating Summons in which it claimed the following relief.

(a) a declaration that the licence dated January 1995 issued by the relevant authority to the defendant under the Pool Betting Act 1967, and any renewals thereof, is within the scope of the Agreement between the plaintiff and the defendant dated 26 November 1987 ('the 1987 Agreement');

(b) a declaration that the plaintiff has the exclusive right to conduct and manage all 3-Digit (3-D) and 4-Digit (4-D) operations in and throughout the State of Sabah pursuant to and in accordance with the said licence dated January 1995 issued to the defendant under the Pool Betting Act 1967, and any renewals thereof;

(c) a declaration that the plaintiff has the exclusive right to appoint all 3-D and 4-D operations agents in the State of Sabah on behalf of the defendant;

(d) an account of the gross sale takings derived from all the 4-D operations and bettings undertaken by the defendant or its agents in breach of the. 1987 agreement and for payment of 98% of the said gross sale takings to the plaintiff;

(e) an injunction to restrain the defendant whether by itself or through its officers, servants, agents or nominees or otherwise howsoever, save and except through the plaintiff, from appointing any agents in respect of 3-D and 4-D operations in the State of Sabah pursuant to the said licence dated January 1995 granted to the defendant under the Pool Betting Act 1967 or any renewals thereof;

(f) an injunction to restrain the defendant whether by itself or through its officers, servants, agents or nominees or otherwise howsoever, save and except through the plaintiff, from conducting or managing any 3-D or 4-D

operations in the State of Sabah pursuant to the said licence dated January 1995 issued to the defendant under the Pool Betting Act 1967, or any renewals thereof;

(g) an injunction to restrain the defendant whether by itself or through its officers, servants, agents, nominees or otherwise howsoever interfering in any way with the plaintiff's conduct and management of all 3-D and 4-D operations in Sabah pursuant to the said licence dated January 1995 issued to the defendant under the Pool Betting Act 1967, or any renewals thereof, and/or the plaintiff's right to conduct and manage the same;

(h) damages;

(i) interest:

(j) costs; and

(k) such further or other orders and relief as this Honourable Court deems just and proper.

The respondent's summons came on for disposal before Ian H.C. Chin J on 3 April 1995. There was a brief hearing at which Counsel read their respective written submissions and addressed a short oral argument. The learned Judge then reserved his decision. Acting with commendable speed, the learned Judge handed down his written judgment some twelve days later. He granted the respondent the declarations and the other relief to which we have adverted earlier in this judgment.

At the commencement of the hearing before us, Mr. Abraham of Counsel for the Club applied to amend his memorandum of appeal by adding three new grounds. They read as follows:

6. The learned Judge erred in law when he failed to appreciate that the said Agreement became void for illegality:

   (a) upon the issuance of the Amended Licence to promote and organise public lotteries under the Sabah Gaming Ordinance (Cap 50) ('the Amended Licence') as the said agreement contravened the Sabah Gaming Ordinance (Cap 50) and the Amended licence; and

   (b) upon the issuance of the new licence as the agreement contravened the Pool Betting Act 1967 and the new licence.

7. The learned Judge erred in law when he failed to appreciate that the said Agreement became void in accordance with s. 24 of the Contracts Act 1950 upon the issuance of the Amended Licence.

8. The learned Judge erred in law when he failed to appreciate that the declarations sought by the respondent amounted to the specific

performance of the said Agreement in breach of s. 20(l)(g) of the Specific Relief Act 1950.

Mr. Anantham who appeared for the respondent did not raise any objections to the amendment. Accordingly, we granted the Club leave to add the new grounds upon which it sought to rely and argue that the learned Judge had erred in granting the relief that he did. We also ordered that the costs of the Club's motion to amend do follow the event of the appeal.

So much for the factual matrix of the case.

The Judgment

As may be seen from the terms of the order dated 15 April 1995, the learned Judge declared that the 1995 licence fell within the scope of the agreement. He did so on the basis that there was to be implied, into the agreement, a term to that effect.

Meaning no discourtesy or disrespect whatsoever to the learned Judge, we must say that we found it extremely difficult to follow the way in which he approached the case. The judgment contains much repetition of the reasons for his conclusion and they appear in different parts of his judgment.

The learned Judge began by first answering and disposing off the arguments raised by the Club against the need to imply a term to the effect contended by the respondent. Having concluded that there was no merit in the argument advanced by the Club he asked himself the question whether the relevant term ought to be implied. He then proceeded to set out and deal with the law governing the implication of terms in a contract. He then returned to disposing of the arguments of the Club once again and repeated some of the views he had previously expressed in his judgment.

Because of the way in which he identified and dealt with the issues before him, we find it necessary to reproduce two passages which reveal his mind upon the critical question that is central to the case.

The first appears at p. 27 of the record provided and reads as follows:

> Do the words in the agreement then bear the meaning which Mr. Roderic Fernandez had argued, which is, it will be recalled, that as long as the club is licensed, under whatever legislation it may be, Sababumi will continue to have the exclusive right to manage and conduct both the on-course and off-course betting for at least 20 years. I cannot find nor have *(sic)* Mr.Roderic Fernandez pointed to any word or words or sentence in the Agreement that is capable of being interpreted or construed in the manner urged by Mr. Roderic Fernandez. But learned Counsel did submit that such a term ought to be implied to give it business efficacy. Mr. Valentine Willie, Counsel for the club, argued that a term

will not be implied to contradict an express term (*Halsbury's Laws of England*, 4th Edn. Vol. 9, at para. 356). It is to this issue of whether there is any contradiction of any express term that I will now turn to. Mr. Valentine Willie's Argument is that if the term, advocated by Mr. Roderic Fernandez, is to be implied it would contradict the express term in the agreement that a licence shall mean the licence issued under the Ordinance and the importation of such a term would mean that the licence would include a licence under the Pool Betting Act 1967, which is a contradiction of the defined term of licence under the Agreement. It has to be appreciated that the Agreement is premised entirely upon the exemption and the licence granted under the Ordinance and all references to the word 'licence' was clearly defined by the preamble, *supra,* to mean the licence granted under the Ordinance. This is even made more clear in clause 11(ii) of the agreement, *supra,* where the licence was referred expressly to as the one issued under the Ordinance. But all that clause 11(ii), *supra,* provides expressly is that where the licence is cancelled, Sababumi is still entitled to operate and manage the ponies and thoroughbred horses racing on the race course and **there is no express provision that Sababumi is not to have any more right in the event that the licence is replaced by another one which enables the Club to carry on the gaming activities. There is no express provision providing for the situation, as in the present case, where the licence issued under the Ordinance was cancelled and another one issued under the Act which enabled the same gaming activities to be continued immediately after the effluxion of the licence issued under the Ordinance. Since there is no such express provision, how can the imputation of a term, if it can be imputed, be said to be contrary to an express term**. I am, therefore, unable to agree with Mr. Valentine Willie that Sababumi could not even cross this first hurdle prohibiting the importation of a term that contradicts an express term because there is no such express term. **The issue is not whether the word 'licence' used in the Agreement linguistically includes a licence issued under the Act but rather, whether the Agreement made provision for the eventuality of the licence under the Ordinance being cancelled and then replaced by one issued under the Act.** It does not appear from the agreement that the parties have reduced into writing what the position would be in such eventuality as had happened. The provision, clause 11(ii) of the agreement merely postulates the eventuality of the licence being cancelled and it does not go further to make provision for the eventuality of a cancellation and then another licence being issued under another legislation to allow the Club to carry on uninterrupted its previous gaming activities." (Emphasis added.)

The second passage appears at p. 37 of the record:

Learned Counsel argued that the Club had put forward a scheme for public lotteries, not based on races to be held on its race course, which was against its own constitution which clearly demonstrates bad faith on the part of the Club and the Court should, under the circumstance, imply the said term. The evidence clearly shows that the Club had wanted to take over the off-course betting as far back as 7 January 1994, when the Club, through its erstwhile advocates, attempted to rewrite the terms of the agreement but this was quickly rebuffed.

The Club, it can safely be assumed, was unhappy with the 2% share of the gross taking. **The excuse then given was that the licence under the Ordinance was cancelled and that the amended licence, issued on 4 April 1992, does not permit any transfer of this amended licence and this, according to the Club, would prevent the granting of the exclusive right to Sababumi under the Agreement.** This letter only came some 21 months after the amended licence was issued and which cancelled the previous licence. **What it shows is that the Club is trying to find every means possible to get out of the Agreement after the race course and its related building had been substantially constructed and more importantly, after it became apparent that millions and millions of ringgit stood to be earned from the punters.** The Club was very much motivated by the very large sum that it stood to gain by the termination of the Agreement or part thereof concerned. It had mounted its failed campaign on 7 January 1994, and the latest campaign must for the reasons I have given, also fail and which in any event would fail independently of bad faith on the part of the Club.

There were other grounds advanced by Mr. Valentine Willie against the importation of the said term. Learned Counsel submitted that to imply the term would be to contradict ss. 92 and 94 of the Evidence Act 1950, which disallow evidence to contradict the terms of the Agreement and he also referred *to Tindok Besar Estate Sdn. Bhd. v. Tinjar company.* [1979] 2 MLJ 229, 233, where Chang Min Tat FJ said:

> ... it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might or even have been within the contemplation of the other party. No agreement would then be safe from being rewritten by one party in a Court of law.

The position that pertains in this case, I repeat, is that **there is no express provision governing the position where the licence under the Ordinance is cancelled and another one issued under the Act which has the effect of allowing the Club to continue, uninterrupted, its gaming activities.** I therefore do not see the relevance of ss. 92 and 94 of the Evidence Act 1950. As for *Tindok Besar Estate Sdn. Bhd. v. Tinjar company,* the Court there recognised that the proviso to s. 92 allows for the admission of a separate oral agreement which *(sic)* the document is silent and which is not inconsistent with its terms. So, that case is of no assistance to STC's case.

I therefore grant the declaration sought by Sababumi that the licence dated January 1995, bearing the reference KK/BP(J)/8.00/4/3/3-1 JD. 1(4) and issued by the Finance Minister of the Government of Malaysia to the Club under the Pool Betting Act 1967, and any renewals thereof, is within the scope of the Agreement made between Sababumi and the Club dated 26 November 1987. This means the club was and still is in breach of the provisions of the agreement that confer exclusive right on Sababumi to conduct and manage all 3-D and 4-D operations in Sabah." (Emphasis added).

The route taken by the learned Judge when arriving at his conclusion may we think, without any injustice being done to him, be outlined as follows:

(1) The question is not whether the parties had in the agreement, agreed that the expression "licence" shall mean the one issued under the Ordinance.

(2) The critical question is whether the parties provided for the eventuality of the licence under the Ordinance being cancelled and replaced by one issued under the Act.

(3) The answer to the question as posed in (2) above must be answered in the negative because there was no such provision.

(4) Since the parties had made no express provision, the Court may properly imply a term in the agreement.

Whether the learned Judge was correct in law in taking this approach is a matter which must be considered later. For we must now turn to address ourselves to the issues that arise for decision in this appeal.

The Issues in the Appeal

When making his opening address to us, Mr. Abraham identified three issues which he said lay at the heart of the appeal. He formulated them as follows:

(1) Whether the Judge was right in law in implying a term into the agreement to the effect that the word "licence" appearing therein includes the 1995 licence;

(2) Whether the agreement became illegal and void after the issuance of the amended and 1995 licences; and

(3) Whether assuming there was a breach of the agreement by the Club, discretionary relief in the form of a declaration ought to have been granted to the respondent.

Mr. Anantham, of Counsel for the respondent, did not direct any criticism against the formulation of these issues.

We are in agreement with Mr. Abraham that the three issues he has formulated are the main ones that call for consideration in this appeal. We must now turn our attention to each of these issues.

The First Issue: Submissions of Counsel

In arguing that the first issue should be resolved in the appellant's favour, Mr. Abraham made four submissions.

First, that the learned Judge, in implying the term in question, exceeded the role entrusted to him by law in that he did not merely interpret the contract that had been made by the parties but actually re-wrote it.

Second, that while the learned Judge adverted to the tests suggested by the several authorities, he did not say which principle or which limb of any particular principle, he was applying to justify the implication of the term.

Third, that the learned Judge adopted the wrong approach to the case before him. The Judge should have construed the agreement as a whole and in the process determined whether the term ought to be implied. Instead the Judge abandoned the interpretation of the agreement and proceeded to interpose the term.

Fourth, that although the learned Judge said that the burden was upon the respondent to show that the term ought to be implied, in truth he reversed the burden by requiring the appellant to show why the term ought not to be implied.

In responding to these submissions, Mr. Anantham argued that as an appellate Court, we ought to place ourselves in the shoes of the parties at the time the agreement was made. He then took us through the salient facts of the case which we have set out earlier in this judgment.

The effect of the transaction, Mr. Anantham said, was that the appellant got the land, the buildings and the other amenities free of charge. The respondent paid for all this. The cost to the respondent as at December 1994 was about RM18 million. Additionally, the respondent was also to manage and maintain the turf club and to conduct pony and horse races as well as the 4-Digit betting. Despite all this, the appellant received 2% of the gross income earned by the respondent. This was a substantial sum, considering the fact that in 1992, the gross income was RM60 million. Indeed, the venture was so lucrative that the respondent had by 1992, recouped all of its initial capital outlay. Further, the land, the buildings and all other amenities, including the right to organise racing and gaming activity, were to revert to the appellant at the end of twenty years.

There was no express term covering the situation that arose. The learned Judge was, therefore, entirely correct in implying the term in question. In doing so, the Judge applied the "officious bystander" test. He was right in adopting that test bearing in mind the facts and circumstances of this case. There was no reversal of the burden. In fact, the Judge expressly directed himself on the question of burden and placed it squarely on the respondent.

Before deciding which, if any of these arguments we ought to accept as having merit, we propose first to address ourselves to the relevant law.

The first issue: The relevant law

The power of a judicial arbiter to imply a term into a contract which has been reduced into writing by the parties and in which their respective rights and obligations are spelt out is an area of the law not altogether free from difficulty.

Nevertheless, the following propositions may be accepted as being beyond controversy.

First, it is for parties who intend to be bound by mutual obligations to make a contract for themselves. It is outside the scope of judicial power to make one for them. This was made plain by Cockburn CJ in *Smith v. The Mayor, Aldermen & Burgesses of the Borough of Harwich* [1857] 140 ER 572, 579 when he said of the litigants before the Court of Common Pleas:

> The parties have entered into a contract to do certain things, upon the assumption that certain necessary assents would first be obtained: but there is no provision, express or implied, to shew that either of them took upon themselves the accomplishment of that preliminary step. That being so, it is not competent to the Court to make a contract for the parties which they have not thought fit to make for themselves, or to import a covenant which does not arise by fair and necessary implication from the language they have used.

Second, where businessmen make an agreement between themselves, whether aided or unaided by legal advisers, and there are ambiguities in their contract, the Court will, as far as possible, lean in favour of upholding their bargain. Support for this proposition and for the very narrow function which is reserved to the Court in the matter of implying terms in a contract is to be found in the decision of the House of Lords in *Hillas & Co. v. Arcos Ltd.* [1932] All ER (Rep.) 494. Lord Wright, in an oft-quoted passage in his speech, laid down the judicial philosophy that underlies the Court's function in this area of the law. Referring to the particular agreement in that case, he said:

> The document of 21 May 1930, cannot be regarded as other than inartistic, and may appear repellant to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are

> appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted.

That the role of the Court in upholding agreements adverted to by Lord Wright is not confined to documents drafted by laymen and includes those prepared by lawyers was recognised by Gibbs J (as he then was) in *Australian Broadcasting Commission v. Australasian Performing Right Association Ltd.* [1973] 129 CLR 99. He said (at p. 109):

> It is trite law that the primary duty of a Court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts and the words of every clause must if possible be construed so as to render them all harmonious one with another. **If the words used are unambiguous the Court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The Court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust**. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust 'even though the construction adopted is not the most obvious or the most grammatically accurate', to use the words from earlier authority cited in *Locke v. Dunlop* [1888] 39 Ch D 387, 393, which although spoken in relation to a will are applicable to the construction of written instruments generally; see also *Bottomley's* Case [1880] 16 Ch. D. 681, 686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally the statement of Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.* [1932] 147 LT 503, 514, that the Court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects', should not in my opinion be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. *Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd.* [1968] 118 CLR 4299, 437, (Emphasis added).

We find the opinion expressed by Gibb J in the foregoing passage to coincide with what we apprehend to be the true legal principles that govern the interpretation of contracts. For that reason we would gratefully adopt his honour's views as our own.

It boils down to this. Where a contract is couched in unambiguous language, the Court must give effect to it. But where the terms of a contract are ambiguous then the Court may imply a term in order to uphold the transaction. See, *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1925] MLJ 719, 752.

Pausing for a moment, we observe that the exception to the strict rule made when there arises an ambiguity in the meaning that is to be attached to words in a contract has no application to the present case. For it was not the respondent's case that the term contended for should be implied because the agreement was capable of being construed in one of two ways. Neither did the learned Judge proceed upon that basis. It follows that the rule of construction that must be adopted in the present case is that which applies to the interpretation of contracts, the meaning of which is unambiguous.

The third proposition which we accept as settled is that a Court's power to imply a term in a contract forms part of its interpretative jurisdiction. This comes across in the following passage in the judgment of Mason J (as he then was) in *Codelfa Construction Pty. Ltd. v. State Rail Authority N.S.W.* [1981] 149 CLP 337, 345:

> In this ocean of litigious controversy there is one large island of agreement between the parties. It is common ground that their contract consists of the agreement dated 21 March 1972 and the various documents which it incorporates. The appellant does not suggest that dehors the agreement and the incorporated documents there is to be found a term actually agreed upon by the parties which together with the contract documents stands as the true contract or which stands in its own right as a collateral contract. Nor does the appellant suggest that there is a case for rectification arising from the existence of such a term on the footing that it was inadvertently omitted from the contract documents. The appellant's case is that a term has to be implied in the contract to give it business efficacy, to make it workable. Consequently, there is no contest as to what constitutes the contract; rather the contest is as to its meaning and effect.
>
> When we say that the implication of a term raises an issue as to the meaning and effect of the contract we do not intend by that statement to convey that the Court is embarking upon an orthodox exercise in the interpretation of the language of a contract that is, assigning a meaning to a particular provision. Nonetheless, the implication of a term is an exercise in interpretation, though not an orthodox instance.

Fourth, an examination of the authorities shows that the law differentiates between two categories of cases -we will call them Category I and Category II - when determining whether a term ought to be implied in a contract, subject always to the qualification that there is absent a contrary intention. Such a contrary intention may of course, take the form of an express stipulation in the contract. For it is a well-established principle of law that a term will not be implied if to do so would contradict some express provision in the contract or set at naught the main aim or object of the contract.

The following observation by the editors of *Chitty on Contracts* 25th Edn., in para. 842 of that work bears out the existence of Category I:

> The implication of a term is a matter of law for the Court and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. In many classes of contract however, implied terms have become standardised, and it is somewhat artificial to attribute such terms to the unexpressed intention of the parties. The Court is in fact laying down a general rule that in all contracts of a certain type - for example sale of goods, landlord and tenant, the carriage of goods by land or sea - certain terms will be implied, unless the implication of such a term would be contrary to the express words of the agreement. Such implications do not depend on the intentions of the parties, actual or presumed, but on more general considerations.
>
> It is also important to realise that such general implications may have a profound effect upon the relationship which one class of persons bears to another, e.g. employers and employees. The real question then becomes, not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction, but the determination of a matter akin to a question of status.

Category I therefore comprises those relationships in which the Court more readily implies a term in the contract unless there is evinced a contrary intention. The Court acts in such cases with greater readiness to imply a term in order to make the particular relationship workable.

Contracts between a banker and his customer *(Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80), between an employer and his employee *(Scally v. Southern Health Board* [1992] 1 AC 294), between a principal and his agent *(Pasuma Pharmacal Corpn. v. McAlister & Co. Ltd.* [1965] 1 MLJ 221), between a vendor and purchaser of immovable property *(Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300, 308) and between a landlord and his tenant *(Liverpool City Council v. Irwin* [1972] AC 239) fall within this category. In the case of contract between a vendor and purchaser of goods, the implication of terms is expressly authorised by statute, namely, the Sale of Goods Act 1957.

The test that is to be applied when implying a term in the relationships within Category I is necessity. See, *Liverpool City Council v. Irwin (supra).*

Category II consists of cases not falling within Category 1, that is to say, where no special relationship such as those recognised by the law exists. The law is less ready to imply a term into a contract falling within Category II. A higher standard or test requires to be satisfied before a Court will act. It is sufficient to quote from two cases to support this view.

In *Codelfa (supra),* Mason J explained the rationale in the following way (at p. 346):

> For obvious reasons the Courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.

And Lord Radcliffe in *Davis Contractors Ltd. v. Fareham U.D.C.* [1956] AC 696, 728 (applied by Thomson L.P. in Pasuma Pharmacal Corpn, *supra) said:*

> But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must he given 'irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances' *(Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] AC 497).

The judgment of Chong Siew Fai J (now C.J. Sabah & Sarawak) in *Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd.* [1993] 2 MLJ 250, (a landlord and tenant case and therefore falling within Category I) contains a useful discussion of all the relevant cases on the subject and a re-statement of the two tests - the lower that applies to cases falling within Category I and the higher that applies to cases falling under Category II. For completeness, we reproduce the following passage in his lordship's judgment (at p. 258):

> In our present case, should a covenant for the termination of the sublease before the expiration of the fixed term as suggested by the plaintiff be implied?

In *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.* [1918] 1 KB 592 at p. 605, Scrutton LJ said:

> The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'of course, so and so will happen; we did not trouble to say that; it is too clear'. Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.'

In other words a term cannot be implied unless the parties must necessarily have intended it such that both would have answered, 'oh of course', to an officious bystander had he suggested it in negotiation.

In *Re Comptoir Commercial Anversois v. Power, Son & Co.* [1920] 1 KB 868 Scrutton LJ remarked at pp. 899-900:

> The Court ... ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter or because one party if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted.

In *Liverpool City Council v. Irwin & Anor* [1977] AC 239, Lord Wilberforce said at p. 254: 'In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more or less; a test, in other words of necessity.' And Lord Edmund-Davis said at p. 266: 'The touchstone is always necessity and not merely reasonableness.'

A more concise statement of law on the subject was propounded in *BP Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council* [1977] 16 ALR 363 where Lord Simon of Glaisdale delivering the opinion of the board said at p. 376:

> ... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.
>
> Thus, for a term to be implied in a contract, it must be both necessary to give business efficacy to the contract and obvious.

The first issue: Was the Judge right in implying the term?

Returning to the present appeal, it is quite apparent that this is not a Category I case. It does not concern any of the well-established relationships that come within that Category. What we have here is a Category II case.

How did the learned Judge approach the case? We have already seen what he said. We have lent emphasis to what he said. Nevertheless, it will be useful to recall his words. This is how he put it:

> ... there is no express provision that Sababumi is not to have any more right in the event that the licence is replaced by another one which enables the club to carry on the gaming activities. There is no express provision providing for the situation, as in the present case, where the licence issued under the Ordinance was cancelled and another one issued under the Act which enabled the same gaming activities to be continued immediately after the effluxion of the licence issued under the Ordinance. Since there is no such express provision, how can the imputation of a term, if it can be imputed, be said to be contrary to an express term.
>
> The issue is not whether the word 'licence' used in the agreement linguistically includes a licence issued under the Act but rather, whether the Agreement made provision for the eventuality of the licence under the Ordinance being cancelled and then replaced by one issued under the Act. It does not appear from the Agreement that the parties have reduced into writing what the position would be in such eventuality as had happened.

In our judgment, the learned Judge adopted a wholly erroneous approach to the case. This is not a case where detailed terms were omitted. On the contrary, the parties here have spelt out their rights and obligations very clearly and made provision for certain contingencies.

The fact that an event has occurred for which the parties made no provision in the agreement is not a valid reason in law for the Court to interfere and imply a term into their contract. In the words of Mason J in *Codelfa (supra)*, this is a case where each party was "prepared to take his chance in relation to an eventuality for which no provision is made".

Yet the Judge acted to provide for an event which the parties were content to leave untouched because they had specifically made provision for cancellation of the licence if another contingency arose. (See cl. 11 of the agreement.) This is precisely what the law forbids.

Having read and re-read his judgment, we are entirely satisfied that there is merit in Mr. Abraham's complaint that the learned Judge re-wrote the agreement. In our judgment, the learned Judge misdirected himself and clearly exceeded the role entrusted to him by law.

The views we have expressed make it unnecessary to address the other submissions made by Mr. Abraham. That is not to say that they are without merit. Indeed we accept them as valid grounds of complaint that go to show that the learned Judge was wrong in implying the term in question; although we are not entirely satisfied that he did reverse the burden by imposing it on the appellant. Whether he did so or not does not really matter once we come to the conclusion, as we have, that there was no legal basis for implying the term.

With respect to Mr. Anantham, the approach he has suggested we ought to take in this matter does not meet the criteria laid down by the authorities. Applying the test suggested by Mr. Anantham - the officious bystander test - to the facts and circumstances of this case, we are unable to agree with him that the conclusion he has suggested would result.

Taking into account all the relevant facts and circumstances of the case and having due regard to the express terms of the agreement, it is, in our judgment, impossible to say, with that degree of certainty which the law requires, that the parties, when making their agreement, would have dismissed the officious bystander testily with the remark: "Of course the agreement will continue even if the existing licence is cancelled and a new licence in whatever terms is issued in the future under some other legislation".

We are entirely satisfied; adopting the objective test suggested by Lord Radcliffe in *Davis Contractors,* that the farthest thing operating upon the minds of the present litigants, when they made their bargain, having regard to all the facts and circumstances in existence at the time when they made it, was the repeal of the Ordinance and its replacement by the Act. Nor can they be said to have had within their contemplation, the cancellation of the original or the Amended licence issued under the Ordinance and the issuance of the 1995 licence containing all those far reaching conditions to which we have already referred. These are the only conclusions that may be drawn when the agreement is construed as a whole. It matters not whether one applies the officious bystander test or that propounded by Lord Simon of Glaisdale in *BP Refinery (supra).* The result is the same. The implication of the term by the Judge was wholly unjustified.

It follows from what we have said thus far that the respondent's claim as formulated in the first declaration ought never to have been granted. The Judge was therefore wrong in not resolving the first issue in the club's favour.

The second issue: Illegality

The second issue arises out of the amended grounds introduced by the appellant at the commencement of this appeal. It is as important as the first. In its

resolution two questions arise. First, whether the agreement, when properly interpreted, amounts to an assignment or transfer of the 1995 licence. Second, if the agreement is an assignment or a transfer, then, whether it is illegal and therefore void. We will deal with each of these questions in turn

With respect to the first question, it was submitted on behalf of the respondent that the agreement was neither a transfer nor an assignment because the club retained some amount of control over the running of the turf club and the gaming activities. With respect we are unable to accept that argument.

It cannot be gainsaid that the Club, by the terms of the agreement, assigned to the respondent all the rights and benefits conferred by the original licence. Mr. Anatham has summarised the effect of that agreement when he addressed us upon the first issue. We have referred to it earlier in this judgment. The respondent was to do everything the Club could do by virtue of the original licence. In return the Club was to receive 2% of the gross takings.

We are of the view that the position here is akin to that which obtained in *Tan Bing Hock v. Abu Samah* [1962] 2 MLJ 148, a case involving an agreement to extract timber from a forest concession. Of the result produced by the agreement in that case, Raja Azlan Shah J (as he then was) said:

> In short, the licence-holder, namely the defendant, merely sits still and gets a lump sum payment of $2,000 while the plaintiff works the area and fulfils all the obligations that are required under the Forest Enactment.

Much the same may be said of the agreement in the present case. True it is, that in *Tan Bing Hock (supra)* the defendant received a lump sum payment while in the present case the Club was to receive an amount that would vary from time to time according to the quantum of the gross takings earned by the respondent. But this is a distinction without difference.

Having concluded that the agreement is an assignment of rights, we turn to consider the second question.

Now, the original licence did not contain any prohibition against assignment. So, it did not matter that there was an assignment of rights under the agreement. But all that changed when the Amended licence was issued on 14 April 1992. There was now condition 9 which prohibited any assignment. And the problem was compounded when the Amended licence was replaced by the 1995 licence under the Act which contained wider conditions than those appearing in either the original or the Amended licence.

We may conveniently summarise Mr. Abraham's arguments on the point as follows:

(1) The Act, by necessary implication, prohibits any transfer or assignment of the new licence. Since the agreement is an assignment of rights, it is caught by the statutory prohibition and is therefore illegal and void.

(2) Even if it may be said that the Act contains no such prohibition, such a conclusion would not affect the final result. For, there is no difference whether the prohibition is contained in the Act or in the licence. An agreement which violates a condition in a licence stands on the same footing as one that violates a statutory prohibition. Both are illegal and void. In the present case, the agreement offends the prohibition against assignment appearing in condition 9 of the Amended licence and the wider conditions appearing in the 1995 licence. The agreement is therefore illegal and void.

In support of these arguments, Mr. Abraham has placed reliance on the decisions in *Tan Lai v. Mohamed bin Mahmud & Ors.* [1982] 1 MLJ 338 and *Paruvathi v. Krishnan* [1983] 2 MLJ 121.

In *Paruvathy (supra),* the Federal Court was confronted with a case where there had been an assignment of a Temporary Occupation Licence issued under the National Land Code, 1965, s. 68 of which provides as follows:

> 68. Except so far as is otherwise prescribed, a temporary occupation licence shall not be capable of assignment; and every such licence shall, except as provided in section 416, terminate on the death of the person, or dissolution of the body, for the time being entitled to the benefit thereof.

Salleh Abas CJ (Malaya) (later Lord President) when delivering the judgment of the Court said (at p. 66):

> It is obvious from this section (the reference here is to s. 68) that a TOL, being a licence only confers a personal right to the licence holder. This right comes to an end when the holder in the case of a natural person dies or in the case of a company or a firm or other bodies is dissolved. Being a personal right, the legal relationship thereby created is only between the licensor and the licensee. The licence is therefore non-transferable or incapable of assignment at the option of the licensee. It is not a right *in rem* which its holder can deal with as he or it pleases to the detriment of the issuing authority. Thus any assignment or arrangement purporting to transfer or assign the whole or any part of the licensed land will be of no effect and such assignment or arrangement will be illegal under s. 24 of the Contracts Act (see *Heng Cheng v. Krishnan* [1955] MLJ 103 and *Murugesan v. Krishnasamy & Anor* [1958] MLJ 92.)

Mr. Anantham's response to these arguments was as follows:

(1) The Act does not expressly nor by implication prohibit an assignment of a licence. It merely imposes a penalty.

(2) There is a difference between a prohibition appearing in a statute and that appearing in a licence. Only an agreement that offends the former is illegal; not an agreement that offends the latter. The authorities cited and relied upon by the club are therefore of no relevance because they concern written law in which there appeared either an express prohibition against transfer or assignment of a licence or a declaration that the licence is non-transferable.

In order to fully appreciate the arguments advanced upon the point now under consideration, it is necessary for us to first ascertain whether the Act expressly or by necessary implication prohibits an assignment of the new licence. Counsel on both sides have drawn our attention to the relevant provisions. They are ss. 5 and 21 of the Act which read as follows:

5(1) Unless there is established a Board under s. 6, the Minister may issue a licence to a person for the collection, operation or promotion of pool betting.

(2) The Minister may refuse to issue or renew a licence to any person without assigning any reason and his decision shall be final.

(3) A licence issued under sub-section (1):

(a) shall be in such form as the minister may think fit;

(b) shall be subject to the payment of such fee for its issue or renewal as may be prescribed;

(c) shall be valid for one calendar year only and may be renewed from year to year from the date of expiration of the licence;

(d) shall be subject to such conditions or restrictions as the Minister may impose from time to time or during the currency of the licence;

(e) may be revoked by the Minister during the currency of the licence without assigning any reason.

(4) After such date as the Yang di-Pertuan Agong may direct the Minister shall not issue or renew any licence under this section.

21(1) Any person who:

(a) makes or enters into a bet upon the result of a prescribed event, whereby he agrees to pay to the other party to the said bet, if the latter should win the bet, a sum of money the amount of which is dependent upon the result of the working of the totalisator on the said event;

(b) sells or offers for sale, or who purchases from any person referred to in para. (a), any ticket, coupon, card or thing entitling or purporting to

entitle the purchaser or holder thereof to any interest in the result of the working of the totalisator on any prescribed event; or

(c) makes any contract or bargain of any kind to pay or receive money upon any event determined or to be determined by the result of the working of the totalisator on any prescribed event,

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding one year or a fine not exceeding one thousand ringgit or to both.

(2) Sub-section (1) shall not apply to the licensee or the Board or any officer, agent or employee of the licensee or the Board while engaged in the lawful conduct of any totalisator for pool betting or of pool betting as such in accordance with this Act, the licence issued under s. 5 or an approved scheme.

Section 21 is curiously worded. In sub-section (1) it sets out a wide range of gaming activities which it makes punishable. In sub-section (2) it excludes from the operation of sub-section (1), *inter alia,* a licensee as well as his servant or agent who lawfully conduct those activities specified in paragraph (a) through (c) of the first sub-section in accordance with, *inter alia,* the provisions of a licence issued under s. 5. No doubt the second sub-section uses the words "in accordance with the licence". It does not say "in accordance with the terms or conditions of the licence". But that is what it means. Any other construction will not make sense.

In our judgment, these two ss. 5 and 21 should be read in this way. The Minister is empowered to issue a licence to any person to carry out the activities to which the Act applies. He may impose conditions in the licence. A person to whom such a licence has been issued may carry on those activities; whether by himself or by his duly authorised employees or agents. It is in the public interest that such agents are not undesirable persons, for example, persons with criminal records. That is why the Minister, in the present case imposed a condition in the new licence requiring the Club to submit for the Minister's approval the list of agents whom the Club wanted to engage.

If any person engages in those activities specified in s. 21(1) without a licence he commits an offence. If a licensee conducts those activities in breach of the conditions appearing in the licence, he too commits an offence. The object is to ensure that only a limited class - the licensee and his employees and agents - conducts gaming business.

When viewed in this way, it becomes clear that Parliament intended, not merely to prescribe a penalty, but to prohibit the performance of those activities set out in paras. (a) through (c) of s. 21(1). The prohibition is not express. But it

is plain enough for us to discern by necessary implication. If we read s. 21(1) in any other way we will negate its true effect and frustrate Parliament's true intention.

In interpreting s. 21 in the way in which we have done, we have had regard to the whole Act, including its object and purpose. It is plain from a reading of the Act as a whole that Parliament's intention in passing it was to regulate and control gaming activity throughout the country. Courts are the obedient of the will of Parliament as expressed in the words of the written law enacted by the latter. They must therefore render an interpretation of the provisions of a statute as best advances the intention of Parliament. By that we do not, of course, mean that we should re-write a statute. We have no authority to do so. We must pay heed to the language of the Act and give it the meaning that advances legislative purpose. And this is what we have done.

Our approach to the construction that we have placed upon ss. 5 and 21 of the Act is in keeping with binding precedent and with respectable authority.

In *Coramas Sdn. Bhd. v. Rakyat First Merchant Bankers Bhd.* [1994] l MLJ 369, Edgar Joseph Jr. SCJ, when dealing with a statute that expressly saved transactions that ran foul of its provisions, restated, with lucidity, the principles that apply in this area of the law. The importance of the propositions made by his Lordship to the point now under consideration necessitates quotation from his judgment *in extenso.* Referring to the judgment of the trial Court in that case, he said (at p. 377 - 379):

> It might be that what caused the Judge to adopt a wrong approach to the question of construction which arose for decision was the general principle referred to by the Supreme Court in the case of *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor.* [1990] 1 MLJ 356 that a contract, the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.
>
> This general principle could have no application to the present case where the statute provides to the opposite effect, namely, that while it prohibits and penalizes certain agreements or arrangements, it nevertheless reveals an intention that generally they shall be valid and enforceable; the exception being where it is otherwise provided in the statute or in pursuance of any provision therein. Provisions of this sort are rare and so we are reminded of the following passage in the judgment of Gibbs ACJ in *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd.* [1978] 139 CLR 410:
>
> > It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because *it is possible for a*

> *statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable,* and in most cases it is sufficient to say, as has been said in many cases of authority, that the *test is* whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is *a question of construction* whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.' (Emphasis added).

We had also kept in mind the provisions of s. 24 of the Contracts Act 1950 (Rev 1974), since the broad question for decision was whether the alleged agreement was unlawful by reason thereof as being an act or undertaking which was forbidden by law in that it violated a prohibitory enactment of the legislature and that it was by reason of that void.

Section 24 of the Contracts Act 1950 provides:

The consideration or object of an agreement is lawful, unless-

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the Court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The relevant principles to be distilled from various authorities which afford guidance on the interpretation of s. 24 of the Contracts Act 1950 are conveniently collected in *Pollock Principles of Contract* (10th Ed) at p. 233, and have been applied in *Babiah v. Mohammed Abdus Subhan* AIR 1954 Hyd 156 (FB); *Fakirchand v. Bensilal* AIR [1955] Hyd 28 (FB) and *Bhashayya v. Chinnapareddi* AIR [1960] AP39. These principles merit reading and are as follows:

> When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context

> that the object of the legislature in imposing the conditions was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition were imposed; (but they) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g. the convenient collection of the revenue.'

In our general survey of the authorities under s. 24 of the Contracts Act 1950, cited in *Pollock,* we encountered the case of *George v. Greater Adelaide Land Development Co. Ltd.* [1929] 43 CLR 91 which shows that a statutory prohibition against an agreement need not be express so long as it is implied. In that case, s. 23 of the Town Planning and Development Act 1920 (SA) made it unlawful for any person to subdivide any land into allotments or to offer for sale or to sell, etc., any existing allotment except in accordance with the provisions of the statute, and the section imposed a penalty on any person acting in contravention of that provision. A contract for the sale of certain allotments had been entered into at a time when the provisions of the statute had not been complied with though the contract was expressed to be subject to the provisions of the statute having been complied with. Indeed, subsequent to the contract, the statute was complied with. It was held that although neither the statute nor the regulations thereunder expressly prohibited selling before issue of a certificate thereunder, the prohibition was implied from the steps to be taken by any person desiring to sell land, and so the contract was illegal and invalid for contravention of the statute and the moneys paid by the purchaser under it recoverable.

These principles were reiterated by his Lordship when delivering the judgment of the Federal Court in *Co-operative Central Bank Ltd. (In receivership) v. Feyen Development Sdn. Bhd.* [1995] 3 MLJ 313.

We would also respectfully accept, as an accurate statement of the law, the following passage in the judgment of Pandey J in *Janki Bai v. Ratan Melu AIR* [1962] MP 117, 121 (FB) where, after having discussed several English authorities he said:

> In view of the authorities noticed in the last two paragraphs, the position is well settled. When an enactment merely imposes a penalty, without declaring a contract made in contravention of it to be illegal or void, the imposition of the penalty, by itself and without more, does not necessarily imply a prohibition of the contract. In such cases, the question always is whether the legislature intended to prohibit the contract. This must be decided upon a construction of the statute. If the object of the enactment, or one of its objects, in imposing the penalty is to protect the general public or any class thereof, it will be construed, in the absence of any other indication of contrary intention expressed in the statute, as implying a prohibition of the contract. On the other hand, if the object of imposing the penalty is merely the protection of the revenue, the contract

will not be regarded as prohibited by implication. Although these principles are not in doubt, difficulties sometimes arise in applying them to particular cases.

In *Commissioner of Income Tax Mysore v. Union Tobacco Co. AIR* [1960] Ker, 276, several persons who had obtained licences to deal in tobacco entered into a partnership with others who were unlicensed. The Cochin Tobacco Act did not expressly prohibit the sale or transfer of a licence issued under its provisions, although it made the cultivation, sale or transport of tobacco without a licence an offence. A notification issued under that Act did, however, contain a provision that expressly prohibited a transfer of licences without the written consent of the Excise Commissioner. The questions that arose for decision were whether there had been a transfer of the relevant licences by reason of the formation of the partnership and whether the deed of partnership was illegal and void. The High Court answered both questions in the affirmative.

We find the following passages in the judgment of Ansari J (at p. 278 of the report) to be particularly instructive:

> [I]t cannot be disputed that creating equitable interests out of the benefits under a licence is covered by the prohibition against transfers. If we were to hold otherwise a licensee by declaring himself a trustee for another of the benefits under a license would bring about what the prohibition under the notification seeks to prevent. It also follows that the prohibition against such a transfer would cover any alienations of the partial benefits as well and the licensee cannot declare himself a trustee of the benefits in favour of another and himself. If doing that contravenes the rule against transfers and we think it does, entering into a partnership also amounts to such a violation, as a partner is a trustee for his other partners. It is therefore clear that a licensee by entering into a partnership passes partial but substantial interests in what he has in favour of another and thereby does what the rule seeks to forbid without permission.
>
> A working test for finding whether the intention [of the Act] be to prohibit is to ascertain whether the punishment is repeated at each act and where that be done the act would be treated as forbidden. (Vide Buckley J in *Victorian Daylesford Syndicate Ltd. v. Dott*, [I905] 2 Ch 624, at p. 630). The Counsel for the assessee has not been able to satisfy us against the incorrectness of the aforesaid test and applying it to s. 6 of the Act, it is clear that a person is punished for each act contrary to the provisions of the Act or rule. It follows the act is forbidden and the contract to do so is void.

We note that s. 6 of the Cochin Tobacco Act (at p. 277 of the report), is cast in terms very similar to s. 21(1) of the Act. Both sections open with general words, followed by paragraphs that describe specific acts or types of conduct and conclude by creating the offence. We are therefore of the view that the test propounded by Ansari J may be safely applied to s. 21 of the Act, with the result that it is to be read as containing a prohibition and not merely imposing a penalty.

In *Phoenix General Insurance Co. of Greece S.A. v. Halvanon Insurance Co. Ltd.* [1988] QB 216, the English Court of Appeal distinguished *Yango Pastoral (supra).* Kerr LJ (with whom Parker and Balcombe LJJ concurred) suggested an alternative approach to the problem by recognising two classes of case. He said (at p. 273):

> (i) Where a statute prohibits both parties from concluding or performing a contract when both or either of them have no authority to do so, the contract is impliedly prohibited: see *In re Mahmoud and Ispahani* [1921] 2 KB 716 and its analysis by Pearce LJ in *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.* [1961] 1 QB 3 745 with which Devlin LJ agreed.
>
> (ii) But where a statute merely prohibits one party from entering into a contract without authority, and or imposes a penalty upon him if he does so (i.e. a unilateral prohibition) it does not follow that the contract itself is impliedly prohibited so as to render it illegal and void. Whether or not the statute has this effect depends upon considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. The statutes considered in *Cope v. Rowlands,* 2 M. & W. 149 and *Cornelius v. Phillips* [1918] AC 199 fell on one side of the line; the Foods Act 1984 would clearly fall on the other.

We will assume for a moment that we are wrong in our conclusion that the Act impliedly prohibits the assignment or transfer of a licence. Even upon a view that the Act is silent upon the matter, the agreement is nevertheless illegal and void because it violates the terms of the new licence. In our judgment, it does not matter that the prohibition against transfer or assignment appears as a condition in the new licence and not in the Act. The same view, albeit in a somewhat different context, was expressed by the Supreme Court in *Minister of Resource Planning & Ors. v. Keruntum Sdn. Bhd.* [1988] 2 MLJ 226. Having regard to scheme and policy of the Act, it does not matter whether the prohibition against assignment is contained in the Act or merely in the licence. The result is the same.

We are fortified in the view we take of the matter by the decision of the Federal Court in *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd.* [1980] 1 MLJ 21 where the facts were as follows.

The appellant sawmill company owned a piece of land, the title to which was indorsed with a restriction in interest that required the land to be used solely for agricultural purposes. The appellant let a portion of its land to the respondent together with a factory building that had been errected upon it. This was in blatant contravention of the restriction in interest appearing upon the title. The respondent tenant failed to pay the rent and the appellant commenced distress proceedings.

Anuar J (as his Lordship then was) discharged the warrant of distress on the ground, inter alia, that the tenancy agreement between the parties was tainted with illegality. On appeal it was argued that there had been no contravention of any law and that the breach of the condition as to use appearing on the title to the land was strictly a matter between the appellant sawmill and the State Authority. The argument was rejected and the appeal dismissed by the Federal Court.

Raja Azlan Shah Ag. CJ (Malaya) (as he then was), after a careful examination of the authorities upon the subject, dealt with the point in this way (at p. 25 of the report):

> That brings us to real crux of this appeal. Is the tenancy agreement void and unenforceable? Now, in the cases to which we have referred, there was an intention to use the subject-matter of the agreement for an unlawful purpose, and also an intention to make use of the lease or agreement for an unlawful purpose. The principles applicable to both cases are the same. In such cases any party to the agreement who has the unlawful intention is precluded from suing upon it. *Ex turpis causa non oritur actio.* The action does not lie; not for the sake of the defendant but because the Court will not lend its assistance to such a plaintiff. It will look behind such cosmetic arrangements to see the real intention.
>
> In the present case, the breach of the express condition is wilful, if not, contumacious. There is a clear intention on the part of the appellants to use the subject-matter of the agreement i.e. the land on which the factory was created, for an unlawful purpose. The object of the express condition is that the land must be cultivated with rubber and pineapple; the category of land use is agriculture, and any unilateral conversion to industry is not permitted. Indeed neither party had power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use.

So too, in the present case, the agreement, if countenanced, would defeat the Act. The agreement therefore falls squarely within s. 24(b) of the Contracts Act, 1950, and is by reason thereof, illegal and void.

The question whether the learned Judge was confronted with the point must be answered in the affirmative. That comes across from the second passage in his judgment appearing at p. 37 of the appeal record and which we have reproduced earlier. However, instead of recognising the animal for what it truly was, he proceeded at a tangent and permitted his judicial mind to be clouded by common emotion. He treated the Club's concern for the legality of the transaction as an attempt to extricate itself out of a solemn bargain. The harsh terms in which he castigated the Club was certainly uncalled for. It was the

result of his failure to properly address his mind to the question of the legality of the agreement.

Arising from what we have said thus far, we would answer in the affirmative the latter of the two questions we formulated when we commenced the present discussion. Consequently, the second issue, like the first must be resolved in the Club's favour.

Our conclusions upon the first and second issues render it unnecessary for us to deal with the third issue formulated by Mr. Abraham. We therefore abstain from entering upon a discussion of it.

The result

For the reasons given in this judgment we were satisfied that the learned Judge was wrong in the decision he arrived at. We accordingly allowed this appeal. The orders made by the Judge were set aside. We also ordered that the costs of the proceedings in the Court below and of the appeal be taxed and be paid by the respondent to the Club. The deposit paid into Court by the Club was ordered to be refunded to it.

Postscript

There is one matter we must make mention of before we conclude. It is this. When the matter first came before the Judge, he asked Counsel before him whether they had any objection to his hearing the case. Counsel said they did not. So the Judge heard the case.

Now, there was a very good reason for the inquiry made by the Judge. The agreement was prepared by a firm of solicitors of which he was a partner. It was prepared by them before his elevation to the bench of the High Court.

The learned Judge thought that there was nothing wrong in his hearing the case. Who could blame him? He asked Counsel if it was all right and they said it was. But that is not the criterion.

The learned Judge, despite the absence of objections from Counsel, ought not, in the circumstances of this case, have heard the matter. He had much too close a connection with the matter. There may be cause for concern that his decision was reached because of knowledge to which he alone was privy at the time the agreement was being negotiated.

We hasten to add that his judgment does not show that to be the case. We merely point out the dangers to which the learned Judge exposed himself by not declining to hear the case.

Reported by S. Puvan & W.A. Sharif